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No. 01-280

In the Supreme Court of the United States

NAPERVILLE READY MIX, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ARTHUR F. ROSENFELD
General Counsel
JOHN H. FERGUSON
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's decision to reduce labor costs by selling its delivery trucks and subcontracting the delivery work was a subject of mandatory bargaining with the union, when, even after the sale of the trucks, petitioner retained virtually complete control over their use and continued to operate the delivery portion of its business essentially without change.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 242 F.3d 744. The decision and order of the National Labor Relations Board (Pet. App. 24-75), and the decision of the administrative law judge (Pet. App. 76-101), are reported at 329 N.L.R.B. 174.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2001. A petition for rehearing was denied on May 17, 2001 (Pet. App. 102-103). The petition for a writ of certiorari was filed on August 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Naperville Ready Mix, Inc. (NRM), produces and delivers concrete for residential construction. Pet. App. 2, 27.[1] Richard Wehrli is petitioner's president. *Ibid.* At all relevant times, petitioner's truck drivers were represented by Teamsters Local 673 (Union). *Ibid.*

On May 7, 1992, during negotiations with the Union for a new collective-bargaining agreement, Wehrli asserted that he wanted to sell petitioner's trucks and have owner-operator subcontractors deliver petitioner's concrete, because petitioner was losing money on the delivery portion of its business. Pet. App. 3, 30. On May 12, Wehrli advised the Union in writing: "I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders. I intend to use individual contractors for all my trucking needs." *Id.* at 3, 30-31. On May 15, petitioner sent the Union a written proposal detailing alterations to the collective bargaining agreement that Wehrli believed were necessary to permit petitioner to contract out its delivery work to owner-operators. *Id.* at 4, 32.

On May 20 and 27, 1992, without waiting for the Union's response to the proposal and without the Union's knowledge, Wehrli met with petitioner's

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[1] Two NRM-affiliated companies, T&W Trucking, Inc. (T&W), and Wehrli Equipment Company (WEC), are also petitioners in this Court. Pet. ii. NRM, T&W, and WEC operate as a single integrated enterprise and therefore constitute a single employer for purposes of the National Labor Relations Act. Pet. App. 9-12, 43-47. This brief refers to all of the affiliated companies collectively as petitioner.

drivers. Pet. App. 4, 32. He offered to sell the trucks to the drivers and to assist them with financing and with the mechanics of becoming owner-operators. *Ibid.* Wehrli told the drivers that those who became subcontractors would no longer be covered by the Union's agreement with petitioner. He further stated that, as trucks were sold to current drivers and to new drivers, current drivers who had not purchased a truck would be laid off in reverse order of seniority. *Ibid.*

Petitioner's truck drivers voted to reject petitioner's contract proposals and to authorize a strike, which began on June 17, 1992. Pet. App. 6, 34. Wehrli then proceeded unilaterally with his plan to sell petitioner's trucks to owner-operators. *Id.* at 5, 55. By the last week of June 1992, Wehrli had entered into handshake agreements with five individuals (including both current and new drivers) for the sale of nine trucks. *Id.* at 5, 35-36. Between June 28 and June 30, Wehrli transferred title in those trucks to the new owners. *Id.* at 5, 36.

In exchange for favorable sales terms, which were set by Wehrli, the purchasers relinquished virtually all control over the use of the trucks after the sale. Pet. App. 5, 52-53. The purchasers made no down payment, and Wehrli supplied the financing. The sales contracts required the purchasers to give "first priority" to petitioner's hauling needs and prohibited them from working for its competitors within a 15-mile radius of its plant. *Id.* at 5, 50.

On July 1, 1992, the five owner-operators began hauling concrete for petitioner. Pet. App. 5, 51. Apart from the nominal change in ownership of the trucks, there was no meaningful change in petitioner's day-to-day business of ready-mix hauling. *Id.* at 6, 52. For example, the owner-operators hauled exclusively for peti-

tioner and received their assignments from petitioner's same dispatchers according to essentially the same procedures as before the sale. *Id.* at 6, 51.

On August 18, 1992, petitioner advised the Union in writing that it intended to sell all of its remaining trucks. Petitioner offered the Union a proposal to that end. Pet. App. 7, 38. However, no further negotiations took place. *Id.* at 38.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. 8, 25. The complaint alleged, in pertinent part, that petitioner violated Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), by unilaterally transferring bargaining-unit work to non-bargaining-unit employees. Pet. App. 8, 25. Although an administrative law judge initially recommended that the complaint be dismissed (*id.* at 76-101), the Board concluded that petitioner violated Section 8(a)(5) "[b]y transferring and/or subcontracting bargaining unit work to owner-drivers without bargaining in good faith to impasse" with the Union. *Id.* at 67.

The Board found that, although petitioner nominally transferred title of the trucks to new owners, petitioner "did not close its delivery operations or go out of the delivery business." Rather, petitioner "continued to engage in the delivery of ready mix product to construction sites, the only difference being that the work formerly performed by bargaining unit drivers was being done by 'owner-drivers' through an elaborate subcontracting arrangement." Pet. App. 52. Thus, the Board found that petitioner "merely replaced the employees driving the trucks with other employees under the 'owner-operator' rubric * * *, maintaining essentially the same control over them that it had

always enjoyed." *Id.* at 52-53. The Board also found that petitioner had subcontracted the delivery work because of "its concern over the labor costs of a Union contract." *Id.* at 53. The Board concluded that "[s]uch subcontracting is a mandatory subject of bargaining." *Ibid.* (citing *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964)).

The Board further found that petitioner had not reached "a genuine impasse in the negotiations with the Union" at the time that petitioner unilaterally commenced the subcontracting of its delivery work. Pet. App. 60. The Board therefore found that petitioner acted unlawfully "through [the] unilateral implementation of its [subcontracting] scheme." *Ibid.* As a remedy, the Board ordered petitioner (among other things) "to restore unit delivery work to the unit employees," and "to offer reinstatement to all employees who lost their jobs as a result of the unlawful transfer of the work outside the unit." *Id.* at 68.

3. The court of appeals enforced the Board's order. Pet. App. 1-23. The court agreed with the Board that "this case is governed by *Fibreboard*." *Id.* at 15. The court explained that, although petitioner was "entitled to sell its trucks," petitioner "was not entitled * * * to shift unit work to non-union subcontractors without first bargaining to impasse with the Union." *Ibid.*

The court found that petitioner "sold the trucks, but it did so as part of a plan that allowed it to remain in the business of delivering ready-mix, albeit using non-union subcontractors instead of bargaining unit employees." Pet. App. 13. As the court explained, "[b]efore and after July 1, 1992, [petitioner]'s business involved the delivery of ready-mix concrete to its customers," and "[n]either the scope nor the manner of this aspect of its business changed in any way after July 1." *Id.* at 14.

The court found that "Wehrli ensured that things would stay functionally the same by carefully structuring the sale of [petitioner]'s trucks to give [petitioner] nearly complete control over how the trucks were used" after the sale. *Ibid.* The court also found "substantial evidence in the record that [petitioner]'s motivation for switching to subcontract haulers was to save on labor costs." *Ibid.* The court noted that "[t]his is precisely the kind of concern that * * * is particularly amenable to resolution through collective bargaining." *Ibid.* (citing *Fibreboard, supra,* and *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666 (1981)).

The court found it "clear" that petitioner and the Union had not reached an impasse in bargaining for an overall labor agreement when petitioner unilaterally sold the trucks and subcontracted out the delivery work. Pet. App. 15-16. The court also rejected petitioner's contention that the Board's remedy "imposes an 'undue or unfair burden.'" *Id.* at 22. The court found that petitioner had not properly preserved its objection to the Board's remedy. *Ibid.* In any event, the court concluded, there was "no evidence that [petitioner] will have any particular difficulty returning its hauling business to unit employees." *Id.* at 23.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Section 8(a)(5) of the National Labor Relations Act (Act), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(d) of the Act explains that the subjects en-

compassed by the duty to bargain collectively include "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). As this Court held in *Fibreboard Paper Products Corporation* v. *NLRB*, 379 U.S. 203 (1964), those provisions require an employer to bargain with the union over a decision whether to "contract[ ] out" work when the employer, in order to reduce labor costs, seeks to "replace[ ] existing employees with those of an independent contractor to do the same work under similar conditions of employment." See *id.* at 213-215. See also *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 679-680 (1981) (reaffirming holding of *Fibreboard*).

In *First National Maintenance*, on the other hand, the Court held that an employer is not legally obligated to bargain with the union over a decision whether "to shut down part of its business purely for economic reasons." 452 U.S. at 686. The Court explained that such a managerial decision, "involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all." *Id.* at 677. The Court further explained that "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc. * * * are to be considered on their particular facts." *Id.* at 686 n.22.

b. Applying those settled principles to the particular facts of this case, the court of appeals correctly concluded that the Board reasonably decided that *Fibreboard*, rather than *First National Maintenance*, governs petitioner's bargaining obligations. As the Board and the court of appeals explained (Pet. App. 12-15, 47-53), the truck sales and transfer of delivery work to owner-operators did not represent "a change in the scope and direction of the enterprise." *First National Main-*

tenance, 452 U.S. at 677. Instead, that transaction was simply a labor-cost driven effort to replace unit employees with unrepresented workers "to do the same work under similar conditions of employment." *Fibreboard*, 379 U.S. at 215.

Although petitioner nominally sold its delivery trucks to the owner-operators, it did *not* close the delivery portion of its business. Pet. App. 14. Rather, petitioner continued, as before, to deliver the ready-mix concrete produced at its plant to its customers' construction sites, and it structured the truck sale transactions to ensure that it would retain "nearly complete control over how the trucks were used." *Ibid.* The manner in which petitioner's deliveries were made by the owner-operators after the sale of the trucks was essentially no different from the manner in which the deliveries had been made by the unit drivers prior to the sale of the trucks. *Ibid.* In short, as the court of appeals found, "[t]he only identifiable difference in how [petitioner] hauled ready-mix concrete" after the sale of its trucks was that "the drivers of the trucks were no longer covered by the Union's collective bargaining agreement." *Ibid.*

2. a. In this Court, petitioner concedes that the Board "rightly focused on the extent to which [petitioner] continued to control the trucks after their sale." Pet. 8. Indeed, petitioner repeatedly asserts (*e.g.*, Pet. 20) that "the level of asset and workforce control distinguishes *Fibreboard* subcontracting from a *First National Maintenance* entrepreneurial partial closing." See also Pet. 11, 18. Petitioner faults the court of appeals, however, for (purportedly) "finding instead that [petitioner]'s bargaining obligations hinged exclusively on whether [petitioner] considered labor costs in its decision to sell its trucks and subcontract its delivery

work." Pet. 8; see also Pet. 14. There is no merit to petitioner's contention, which is based on a mischaracterization of the court of appeals' decision.

The court of appeals' holding that "this case is governed by *Fibreboard*" (Pet. App. 15) does not turn "exclusively on whether [petitioner] considered labor costs." Pet. 8. Rather, the court, as expressly authorized by *Fibreboard*, took into account petitioner's labor-cost motivation as one among several factors in determining that *Fibreboard* rather than *First National Maintenance* applies. See Pet. App. 13-15; *Fibreboard*, 379 U.S. at 213-214. In particular, the court of appeals explicitly considered whether petitioner continued to control the use of the delivery trucks after their sale to the owner-operators. See Pet. App. 5-6, 14. That is the same test that petitioner now urges before this Court.

As described above, far from ignoring the issue of continued control over the trucks, the court of appeals specifically found, as had the Board (Pet. App. 52-53), that "Wehrli ensured that things would stay functionally the same by carefully structuring the sale of [petitioner]'s trucks to give [petitioner] *nearly complete control* over how the trucks were used" after the sale. *Id.* at 14 (emphasis added). The court emphasized (*id.* at 5) that the purchasers of the trucks "gave up almost all control over the use of the trucks" in exchange for favorable sales terms from Wehrli.[2] Moreover, after

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[2] In describing the control retained by petitioner, the court of appeals noted that, "[m]ost importantly, there was a 'first priority' provision that required the buyers to give first priority to the hauling needs of [petitioner] so long as [petitioner] provided reasonable notice of its intent to use the subcontractor." Pet. App. 5. The first priority requirement "continued until the principal on the truck was paid off." *Ibid.* Also, "[t]he sales contract forbade the buyers from working for [petitioner]'s competitors within a

the sale of the trucks, "the drivers still received their orders from the same dispatcher and in accordance with essentially the same procedures previously used." *Id.* at 14. Although petitioner argues (*e.g.*, Pet. 18, 25) that it did not retain control over the trucks after title formally passed to the owner-operators, the contrary factual findings of the Board and the court of appeals raise no issue warranting this Court's attention. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is no merit to petitioner's suggestion (Pet. 18) that *Fibreboard* is inapplicable to this case simply because *Fibreboard* did not involve a sale of assets, whereas petitioner sold its trucks. As noted above, although petitioner sold the trucks, it did not leave the ready-mix delivery business. Rather, after the sales, "[n]either the scope nor the manner of this aspect of its business changed in any way," and petitioner retained "nearly complete control over how the trucks were used." Pet. App. 14. Nothing in *Fibreboard* or in *First National Maintenance* precludes the Board from finding that, in these circumstances, petitioner's decision to subcontract unit work was a mandatory bargaining subject, merely because petitioner implemented that decision through a nominal sale of assets.

b. Petitioner also errs in asserting (Pet. 23-28) that, in order to find that petitioner continued to control the trucks after title passed to the owner-operator purchasers, the Board was required to find, as a threshold

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fifteen mile radius of [petitioner]'s plant." *Ibid.* Finally, Wehrli retained a security interest in the trucks, "under which he was entitled to find a buyer in default if [petitioner] had a good faith belief that the driver was failing to perform the terms of the sales contract." *Ibid.*

matter, that petitioner was an "alter ego" of the purchasers. See *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974) (explaining that an entity is an "alter ego" of another entity if it is merely a "disguised continuance" of that entity). *Fibreboard*, upon which the Board relied here, does not hold that subcontracting is a mandatory bargaining subject only if the employer is an "alter ego" of the entity to which it wishes to subcontract unit work. Nor is there any authority for such a proposition.

There is also no merit to petitioner's contention (Pet. 23, 25) that the Board was required to undertake an alter ego analysis because it used the term "sham" in describing the truck sales transactions. See, *e.g.*, Pet. App. 51. As the court of appeals explained, "[t]he Board was saying only that the transactions were * * * 'sham,' insofar as their employment consequences were concerned." *Id.* at 12-13. As discussed above, the record in this case amply supports that characterization of the truck sales.[3]

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[3] Petitioner incorrectly suggests (Pet. 26) that the decision in this case conflicts with *Douglas Foods Corporation* v. *NLRB*, 251 F.3d 1056 (D.C. Cir. 2001). That case did not involve the question presented here—whether an employer's decision to effectuate a subcontracting scheme by means of a sale of assets designed for that purpose is, in accordance with *Fibreboard*, a mandatory subject of bargaining under Section 8(a)(5) of the Act. *Douglas Foods* involved instead the question whether an asset sale violated Section 8(a)(3) of the Act because it was motivated by anti-union animus. See 251 F.3d at 1060. The Board had found that the sale was improperly motivated because it was a sham transaction between alter egos. *Id.* at 1062. The court of appeals concluded that the Board's determination that the employer and the purchaser were alter egos was not supported by substantial evidence. *Ibid.* The court cited the court of appeals' decision in the present case, with apparent approval, in support of the proposition that the

3. Petitioner errs in contending (Pet. 14-16, 19-20) that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals.

In *Arrow Automotive Industries, Inc.* v. *NLRB*, 853 F.2d 223 (4th Cir. 1988) (cited at Pet. 15), the employer decided to shut down one of its plants and to move the work being performed there to another plant in a different State. 853 F.2d. at 223. The court concluded that the employer's decision "qualified as a 'significant change in operations,'" concerning which mandatory bargaining was not required under *First National Maintenance*. *Id.* at 228. No such significant change to petitioner's delivery operation occurred here. See pp. 7-8, 9-10, *supra*. Moreover, the court in *Arrow Automotive* pointed out that the case before it did not involve "an attempt on the part of an employer to subcontract part of the work of an ongoing operation." *Id.* at 231. This case, in contrast, involves precisely that situation.

Petitioner's reliance on *Dorsey Trailers, Inc.* v. *NLRB*, 134 F.3d 125 (3d Cir. 1998) (cited at Pet. 16), is also mistaken. In that case, the court found that the employer had decided to subcontract out unit work not, as in this case, to reduce labor costs, but in order to "avoid lost sales," which it would have otherwise sustained because of a lack of qualified welders and insufficient capacity at its unionized plant. *Id.* at 132. The court further found that the subcontracting in that case had no "adverse impact on the bargaining unit." *Id.* at 133. In this case, by contrast, the bargaining unit clearly was adversely impacted because delivery work

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Board generally "did not invoke [the] 'sham transaction' doctrine [that it had invoked in *Douglas Foods*] where legal transfer of title was undisputed." *Id.* at 1064.

was transferred out of the unit and several employees lost their jobs.

Finally, *NLRB* v. *Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966) (cited at Pet. 19), is also inapposite. There, the court found that "a basic operational change [took] place when the dairy decided to completely change its existing distribution system." 350 F.2d at 111. Rather than continue to deliver its products through its "driver-salesmen," the dairy decided to sell its products at the plant dock to independent distributors, who also bought the dairy's delivery trucks. *Ibid.* The dairy did not finance the sale or arrange financing. *Ibid.* The routes driven by the new independent distributors did not correspond to the previous routes of the driver-salesmen. *Ibid.* Moreover, the independent distributors "were solely responsible for selling the products," which had not been the case before the sale of the delivery trucks. *Ibid.* Finally, the dairy had "no concern with what was done with the products," and the dairy placed few substantial restrictions on the manner in which the independent distributors operated. *Ibid.* The facts in this case, in which petitioner continued to operate its delivery business essentially without change, through its own dispatchers, are starkly to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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